

BEFORE THE
BOARD OF ACCOUNTANCY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation)	
Against:)	
)	
JAMES BRIAN HAYNES)	No. AC-97-25
11253 Provencal Plc)	OAH No. L-1997060339
San Diego, California 92128)	
)	<u>DECISION</u>
Certificate No. 8562,)	
)	
Respondent.)	
_____)	

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Board of Accountancy as its decision in the above-entitled matter.

This Decision shall become effective March 12, 1998.

IT IS SO ORDERED February 10, 1998.

BOARD OF ACCOUNTANCY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

By: 
BOARD PRESIDENT

BEFORE THE
BOARD OF ACCOUNTANCY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation)	No. AC-97-25
Against:)	
)	OAH No. L-1997060339
JAMES BRIAN HAYNES, CPA)	
9415 Oviedo Street)	
San Diego, CA 92129)	
)	
CPA No. 54234)	
)	
Respondent.)	
_____)	

PROPOSED DECISION

On January 9, 1998, in San Diego, California, Alan S. Meth, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

Kathleen B. Y. Lam, Deputy Attorney General, represented the complainant.

John Murphy, Attorney At Law, represented respondent.

Evidence was received, the record was closed, and the matter was submitted.

FINDINGS OF FACT

I

On May 5, 1997, Carol Sigmann, Executive Officer of the Board of Accountancy (hereafter, "Board") of the State of California, filed Accusation No. AC-97-25 in her official capacity. Respondent signed a Notice of Defense dated May 27, 1997.

II

On November 17, 1989, the Board issued certificate number CPA 54234 (Certified Public Accountant) to respondent. It must be renewed every two years. The certificate expired and was not valid between December 1, 1992, and September 1, 1994 because respondent did not pay the renewal fee and did not submit a declaration of compliance with continuing education requirements.

On March 17, 1993, respondent submitted a renewal application with the required fees but without the required declaration of compliance with applicable continuing education regulations. The license was put on hold (inactive). The certificate was renewed active on September 2, 1994, after respondent signed a declaration attesting to compliance with continuing education requirements. The certificate expired and was not valid during the period December 1, 1994, through October 26, 1995, because respondent did not pay the renewal fees and submit the required continuing education declaration. The certificate was renewed effective October 27, 1995 upon submission of the fees and declaration. On August 30, 1996, at respondent's request, the license was changed from active to inactive (without meeting continuing education requirements). The license is currently inactive through November 30, 1998.

III

Mario Crivello is a general contractor and operates his own small business. He attended a seminar respondent gave in November, 1993, obtained respondent's business card, and called him about a month later. At the seminar respondent gave, he indicated he was a CPA.

Crivello retained respondent as a CPA at the end of 1993 to do his bookkeeping and taxes for 1994 and his 1993 personal tax returns. Crivello thought respondent was more qualified than the person who had previously performed these services for him.

Respondent performed monthly book work, payroll taxes, prepared monthly statements, and year end 1099 and W-2 forms during 1994. Crivello gave respondent his records for respondent to prepare his 1994 tax returns toward the end of 1994 and beginning of 1995. Respondent completed Crivello's personal state and federal returns on April 15, 1995. Respondent transmitted the returns to Crivello by letter; respondent's stationary indicates he is a certified public accountant. On the federal return, in the box calling for the name of the preparer, respondent wrote "James B. Haynes, CPA."

Later during 1995, problems between respondent and Crivello developed. Respondent did not prepare W-2 and 1099 forms, and did not submit the quarterly federal tax return for the period ending September 30, 1994. Crivello talked to respondent about this. Respondent said he would check into it. Crivello assumed respondent did not take care of these matters and between February and April, 1995, asked for his records back repeatedly. Respondent said he would give them back, but did not do so. Crivello eventually filed a complaint with the Board, and in August, 1995, respondent returned his records.

IV

Natalie daCosta is an engineer with Caltrans. She met respondent in 1993 and asked him to check her 1992 tax returns. She had purchased a duplex and although she prepared the returns, she decided she needed help with them. Then, in May, 1994, daCosta hired respondent to oversee the management of her duplex. daCosta had applied to the Peace Corps and expected to be gone from the United States for two years. She hired a property manager to manage her duplex, and wanted respondent to oversee the work of the property manager. She gave him the authority to authorize any expenses between \$500 and \$1000. If an expense were more than \$1000, he was required to contact her. daCosta had personal and business accounts with the University and State Employees Credit Union. She intended to add him to the business account so he could write checks on the account, but due to a mixup at the credit union, respondent obtained this authority over her personal account.

daCosta did not enter the Peace Corps. Instead, in March, she was transferred to Los Angeles, and remained there until February, 1995. She gave respondent her Los Angeles address and phone number. She also had a mailing address in Bonita in the San Diego area, and she had an arrangement with a friend who would pick up her mail and mail it to her in Los Angeles.

daCosta was to receive her bank statements from the credit union. However, in October, she realized she had not received her September or October statements. She called the credit union and was told the statements had been mailed to respondent's address on Aero Drive in San Diego. She had not authorized him to do this. She called respondent and asked him to mail the September and October statements to her, but he did not. She called him several more times, and during one conversation, he proposed organizing her finances. In March, 1995, daCosta moved to El Centro. She still had not received any of her statements.

In June or July, 1995, she obtained copies of her statements from the credit union after respondent failed to provide them to her. daCosta examined her statements and discovered he had withdrawn \$1200.00 by cash on November 2, 1994 and \$1000.00 by cash on February 8, 1995. He filled out and signed the withdrawal slips. daCosta had not given him permission or authority to make these withdrawals and they exceeded the amount he was permitted to withdraw without her permission. daCosta did not learn of these withdrawals from respondent.

In April, 1995, respondent called daCosta when she was living in El Centro and asked to borrow \$7000.00. daCosta thought this was an unusual request and was reluctant to lend him the money. She asked him why he needed the money. He told her he was involved in a car lease and needed the money to comply with the lease agreement, and if he paid \$14000.00 by a certain date, charges would be dropped. He said he had the other \$7000.00 lined up from other sources. They spoke for about 30 to 40 minutes. She eventually agreed to lend him the money. She believed he would repay \$3500.00 by the end of April and the rest in a year. Neither respondent nor daCosta prepared a written contract or note to evidence the loan.

A few weeks later, daCosta came to San Diego to verify the loan with the credit union and learned he had withdrawn \$13,790.24 from her account. He had a cashier's check prepared on April 14, 1995, payable to Enterprise Leasing. daCosta had not authorized him to withdraw this amount from her account. She called him to ask about this. Respondent explained the other people had not come through and he would repay her. In June, daCosta got the bank statement which reflected this transaction, as well as the statements which reflected the earlier withdrawals.

Respondent did not voluntarily repay any of the money he obtained from daCosta. She hired an attorney. In October, respondent signed a promissory note in which he agreed to pay her \$16,123.52, which represented the two unauthorized withdrawals, the April loan, and interest. He eventually repaid her the entire amount, plus attorneys fees.

Respondent was to prepare daCosta's 1994 tax returns but he failed to do so. In March, 1995, he told her he would be doing them, and in April, he said he had filed for an extension. Thereafter, they severed their business relationship. daCosta then filed her tax return, and was notified by the Franchise Tax Board she was assessed a penalty for failing to file her return on time. The FTB later reduced the amount of the penalty.

V

Nancy Faszter is an investigator for the Board and was assigned to investigate this matter. She asked respondent for a list of the continuing education courses he had taken for the period November 30, 1992 through November 30, 1994. He gave her a list of classes he taught at National University. The Board limits the number of credits which a licensee can obtain by teaching to 40. A licensee is required to take 80 hours of continuing education every two years. Respondent could not provide certificates of completion for the remaining 40 hours required.

Respondent took 30 hours of continuing education during 1996. These continuing education hours had no impact on the expired periods for 1992-94.

VI

Respondent is 37 years old and has lived in the San Diego area all his life. He attended USIU and did graduate work at USC. He worked for a firm for a period of time doing audits, and then became Chief Financial Officer for a company which developed real estate. He worked there around 1991-92 and was successful. Unfortunately, the company was sold and he unexpectedly lost his job. He was unable to find another job and became depressed. He eventually opened his own practice in 1991 but did not have many clients. He also had some personal problems and had to move his office four times over the years. His practice never became successful. He left public accounting and is presently with a consulting firm which helps companies manage their businesses.

VII

Respondent explained he made the two withdrawals from daCosta's account because he did not think she would object. However, he never told her about the withdrawals, and had the audacity to try to borrow money from her while still hiding these withdrawals from her. He denied giving a change of address to the credit union although the statements reflect his business address. He claimed he told daCosta he might need as much as \$14,000 to \$16,000 for the lease payment, and he thought he had her permission to withdraw \$13,790.24. That claim is not believed. He never told daCosta how much he withdrew, nor did he document the amount of the loan. daCosta had to drive to San Diego from El Centro to determine if he withdrew any funds from her account, and then learned of the larger amount. She never agreed to it.

VIII

Respondent had the authority to write checks and withdraw funds from daCosta's bank account for a limited, business purpose. Instead, he twice withdrew money for his own purpose without daCosta's permission or knowledge, and did not tell her he did so at or near the time. Then, while owing her \$2200.00, and her not knowing he had taken these funds, he asked for and received permission from daCosta to withdraw \$7000.00 for his own use. But he abused that authority and took nearly twice that amount. Again, he did not tell her about this. On top of these acts of dishonesty, respondent attempted to hide his actions by having the bank statements sent to him, thereby preventing daCosta from learning about his actions. When his

conduct all came to light, daCosta still had to hire a lawyer to get him to repay her.

Respondent's conduct amounted to embezzlement. He took advantage of his client. His unsubstantiated claims of depression and personal problems hardly justify or explain his behavior. When considered in light of his failure to remain properly licensed and take continuing education courses required of all licensees, and his failure to perform the services he was hired to perform for daCosta and Crivello, the only appropriate penalty is revocation.

IX

The reasonable costs of investigation and enforcement of the case, taking into account the evidence offered by the Board, the relative success of the action, the time, ability, and expertise of the attorney who represented complainant, and bearing in mind the intent of Business and Professions Code section 125.3 is to permit recovery of costs actually expended and not merely the hypothetical market value of services, including Board employees, is \$5106.50.

DETERMINATION OF ISSUES

I

Cause to suspend or revoke respondent's license pursuant to Business and Professions Code section 5100(f) for violating sections 5050 and 5055 was established by Findings II, III, and IV in that between December 1, 1994 and October 26, 1995, respondent practiced public accountancy and held himself out as a certified public accountant when he did not have a valid license.

II

Cause to suspend or revoke respondent's license pursuant to Business and Professions Code section 5100(h) was established by Finding IV in that respondent breached his fiduciary responsibility by failing to prepare daCosta's 1994 tax returns.

III

Cause to suspend or revoke respondent's license pursuant to Business and Professions Code section 5100(c), (h), and (j) was established by Findings IV, VII, and VIII. Respondent's conduct demonstrated dishonesty and fraud, showed he breached his fiduciary responsibility toward his client, and constituted embezzlement, theft, and misappropriation of funds.

IV

Cause to suspend or revoke respondent's license pursuant to Business and Professions Code section 5100(f) for violating section 5037(b) and Title 16, California Code of Regulations, section 68, was established by Findings III and IV in that respondent failed to return records when requested by his clients Crivello and daCosta.

V

Cause to suspend or revoke respondent's license pursuant to Business and Professions Code section 5100(f) for violating Title 16, California Code of Regulations, section 87, was established by Finding II and V in that respondent failed to comply with the Board's continuing education requirements.

VI

Pursuant to Finding IX, respondent shall reimburse the Board for its costs of investigation and enforcement of this matter in the amount of \$5106.50.

ORDER

I

Certified Public Accountant certificate number 54234 issued to respondent James Brian Haynes is hereby revoked.

II

Respondent is ordered to reimburse the Board for its costs of investigation and enforcement of this matter in the amount of \$5106.50.

Dated: January 16, 1998



ALAN S. METH
Administrative Law Judge
Office of Administrative Hearings

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of the State of California
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6
7 BEFORE THE BOARD OF ACCOUNTANCY

8 DEPARTMENT OF CONSUMER AFFAIRS

9 STATE OF CALIFORNIA

10 In the Matter of the Accusation) Case No. AC-97-25
Against:)
11 JAMES BRIAN HAYNES, CPA) ACCUSATION
12 9415 Oviedo Street)
San Diego, CA 92129)
13 CPA Certif.No. 54234)
14 Respondent.)
15

16 Complainant Carol B. Sigmann, as cause for disciplinary
17 action, alleges:

18 1. Complainant is the Executive Officer of the
19 California State Board of Accountancy ("Board") and makes and
20 files this accusation solely in her official capacity.

21 License History

22 2. On or about November 17, 1989, the Board issued
23 certified public accountant certificate #54234 to James Brian
24 Haynes ("respondent").

25 The certificate expired and was not valid between December
26 1, 1992 through September 1, 1994 because of failure to pay the
27 renewal fee and failure to submit required evidence of continuing

1 education. On or about March 17, 1993, a renewal application was
2 submitted but did not include the required declaration of
3 compliance with applicable continuing education regulations. As
4 a result, the license renewal was "put on hold" ("inactive").
5 After notification to respondent, the certificate was renewed and
6 placed in "active" status, effective September 2, 1994.

7 The certificate again expired and was not valid between
8 December 1, 1994 through October 26, 1995 because of failure to
9 pay the renewal fee and failure to submit required evidence of
10 continuing education. The certificate was renewed, effective
11 October 27, 1995 on receipt of the required renewal fee and
12 evidence of continuing education.

13 Effective August 30, 1996, at licensee's request, the
14 certificate was changed from "active" to "inactive" based on
15 licensee's failure to meet the continuing education requirements.
16 The certificate remains currently "inactive" and is current in
17 that status through November 30, 1998.

18 Statutes and Regulations

19 3. This accusation refers to the following statutes of
20 the California Business and Professions Code ("Code"):

21 A. Section 118(b) provides that the expiration of a
22 license shall not, during any period in which it may be renewed,
23 restored, reissued, or reinstated, deprive the Board of its
24 authority to institute or continue a disciplinary proceeding
25 against a licensee.

26 B. Section 5050 provides in pertinent part as follows:
27 "No person shall engage in the practice of public

1 accountancy in this State unless such person is the
2 holder of a valid permit to practice public accountancy
3 issued by the board..."

4 C. Section 5055 provides that "[a]ny person who has
5 received from the board a certificate of certified public
6 accountant and holds a valid permit to practice . . . shall be
7 styled and known as a 'certified public accountant' and may also
8 use the abbreviatiaon 'C.P.A.' No other person, . . . , shall
9 assume or use that title, designation, or abbreviation or any
10 other title, designation, sign, card or device tending to
11 indicate that the person using it is a certified public
12 accountant."

13 D. Section 5051 provides in pertinent part that a
14 person is deemed to be engaging in the practice of public
15 accountancy if he or she renders professional services generally
16 to clients for compensation in any or all matters relating to
17 accounting procedure and to the recording, presentation, or
18 certification of financial information or data (subd.(e)),
19 prepares statements as a part of bookkeeping operations for
20 clients (subd.(f)), prepares or signs as a tax preparer, tax
21 returns for clients (subd.(g)), prepares personal financial or
22 investment plans or provides to clients products or services of
23 others in implementation of personal financial or investment
24 plans (subd.(h)), or provides management consulting services to
25 clients (subd.(i)). Activities set forth in subdivisions (f)
26 through (i), inclusive, are "public accountancy" only when
27 performed by a person holding out as a certified public

1 accountant.

2 E. Section 5100 provides that the Board may revoke,
3 suspend or refuse to renew the permit or certificate of any
4 licensee for unprofessional conduct, which conduct includes:

5 "(c) Dishonesty, fraud, or gross negligence in the
6 practice of public accountancy or in the performance of
7 the bookkeeping operations described in Section 5052.

8 "(f) "Wilful violation of this chapter or any rule or
9 regulation promulgated by the board under the authority
10 granted under this chapter.

11 "(h) Fiscal dishonesty or breach of fiduciary
12 responsibility of any kind.

13 "(j) Embezzlement, theft, misappropriation of funds or
14 property, or obtaining money, property, or other
15 valuable consideration by fraudulent means or false
16 pretenses."

17 F. Section 5037(b) provides that a licensee must
18 furnish to his/her client or former client on request and
19 reasonable notice a copy of working papers of the licensee (of
20 certain categories) and "any accounting or other records
21 belonging to, or obtained from or on behalf of, the client which
22 the licensee removed from the client's premises or received for
23 the client's account".

24 G. Section 5107 provides for the recovery by the Board
25 of its reasonable costs of investigation and prosecution,
26 including attorney's fees if respondent is found to have
27 violated, inter alia, Code section 5100(c), ((h), or (j)).

1 4. This accusation refers to the following sections of
2 Title 16, California Code of Regulation ("CCR"):

3 A. Section 68 provides as follows:

4 "A licensee, after demand by or on behalf of a client,
5 for books, records or other data, whether in written or
6 machine sensible form, that are the client's records
7 shall not retain such records. Unpaid fees do not
8 constitute justification for retention of client
9 records.

10 Although, in general the accountant's working papers
11 are the property of the licensee, if such working
12 papers include records which would ordinarily
13 constitute part of the client's books and records and
14 are not otherwise available to the client, then the
15 information on those working papers must be treated the
16 same as if it were part of the client's books and
17 records."

18 B. Section 87(a) provides as follows:

19 "A licensee shall be required, as a condition of active
20 status license renewal, to have completed at least 80
21 hours of qualifying continuing education in the two-
22 year period immediately preceding license renewal and
23 to have submitted the statement required by section 89.
24 A licensee engaged in the practice of public
25 accountancy as defined in Section 5051 of the Business
26 and Professions Code is required to hold a license in
27 active status. No carryover of continuing education is

1 permitted from one two-year period to another."

2 C. Section 89(b) and (c) provide that to receive
3 continuing education credits, the licensee is required to obtain
4 and retain for four years after renewal a certificate of
5 completion or its equivalent which provides certain enumerated
6 information about the course, education organization, hours
7 claimed, etc.

8 Charges and Allegations

9 5. Respondent's license is subject to discipline
10 pursuant to Code sections 5050 and 5055 because between December
11 1, 1994 and October 26, 1995 he practiced public accountancy
12 without a valid permit, in that he, as a CPA, prepared the 1994
13 federal income tax return of clients Mario and Kristen Crivello,
14 and identified himself using the CPA designation in the signature
15 block on the tax return.

16 6. Respondent's license is further subject to
17 discipline pursuant to Code section 5050 in that during the same
18 December 1, 1994 to October 28, 1995 time period when he had no
19 valid permit, respondent held himself out to client Natalie
20 daCosta as a CPA and agreed to prepare her 1994 income tax
21 returns.

22 7. Respondent's license is further subject to
23 discipline pursuant to Code section 5100(h) regarding his
24 acceptance of the fiduciary duty to prepare Ms. daCosta's 1994
25 income tax returns and then failure to prepare those tax returns,
26 which failure resulted in his client having both penalties and
27 interest assessed against her by the State of California.

1 8. Respondent's license is further subject to
2 discipline pursuant to Code section 5100(c), (h), and (j) as more
3 particularly alleged below:

4 A. In approximately May, 1994, Natalie daCosta engaged
5 respondent to oversee the transactions of a property management
6 company that was managing her rental property. Respondent became
7 a second signor on one of two checking accounts of Ms. daCosta
8 for the purpose of facilitating his oversight functions.

9 B. On or about November 2, 1994, respondent withdrew
10 \$1,200 from his client's checking account for his own use
11 unconnected with his oversight responsibility for the client and
12 without his client's consent or knowledge.

13 C. On or about February 8, 1995, respondent withdrew
14 \$1,000 from his client's checking account for his own use
15 unconnected with his oversight responsibility for the client and
16 without his client's consent or knowledge.

17 D. On or about April 11, 1995, respondent convinced
18 Ms. daCosta to loan him \$7,000. Thereafter, on or about April
19 14, 1995, respondent withdrew \$13,790.24 directly from his
20 client's checking account for his own use, unconnected with his
21 oversight responsibility for the client. The amount was
22 \$6,790.14 in excess of the amount approved by his client. She
23 was unaware of any intention of respondent to borrow more than
24 \$7,000 from her.

25 E. In late 1994 and again in January of 1995,
26 respondent's client requested copies of her bank statements. The
27 address to which the bank statements were sent had been changed

1 to that of respondent. Respondent did not respond to repeated
2 requests of his client for the statements, thus actively and
3 knowingly concealing from her his unauthorized withdrawals of
4 money.

5 The above actions of respondent constitute breach of a
6 fiduciary responsibility, theft, and fraudulent concealment.

7 9. Respondent's license is further subject to
8 discipline pursuant to Code section 5100(f) in conjunction with
9 section 5037(b) and CCR section 68 in that he failed to return
10 records when requested by clients Crivello (tax related
11 information) and by client daCosta (bank statements).

12 10. Respondent's license is further subject to
13 discipline pursuant to Code section 5100(f) in conjunction with
14 CCR sections 87(a) and 89(b) in that he failed to comply with the
15 continuing education requirements of Board regulation.

16 WHEREFORE, complainant requests that the Board hold a
17 hearing on the matters alleged herein, and that following said
18 hearing, the Board issue a decision:

19 1. Revoking or suspending Certificate Number 54234,
20 heretofore issued to respondent;

21 2. Awarding the costs of investigation and
22 prosecution, pursuant to Code section 5107;

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24 ///

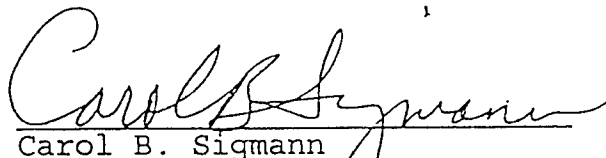
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1 3. Taking such other and further action as the Board
2 deems appropriate to protect the public health, safety and
3 welfare.

4
5 DATED: May 5, 1997.

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9 Carol B. Sigmann
10 Executive Officer
11 Board of Accountancy
12 Department of Consumer Affairs
13 State of California

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Complainant